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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/759,788	01/16/2004	Thomas T. Yamashita	YAMA-009	8159
24353 7590 05/07/2009 BOZICEVIC, FIELD & FRANCIS LLP 1900 UNIVERSITY AVENUE SUITE 200 EAST PALO ALTO, CA 94303				
EXAMINER				
LEVY, NEIL S				
ART UNIT		PAPER NUMBER		
1615				
MAIL DATE		DELIVERY MODE		
05/07/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/759,788

**Applicant(s)**

YAMASHITA, THOMAS T.

**Examiner**

NEIL LEVY

**Art Unit**

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 20 April 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 3-8, 10, 11, 13, 14 and 16-40 is/are pending in the application.
- 4a) Of the above claim(s) 21-37 and 40 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-8, 10, 11, 13, 14, & 16 & 18-20, 38 & 39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1, 3-8, 10, 11, 13, 14 and 16-40 are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 21-37 stand withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention and species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 1/23/06.

Claim 40 is to administration, thus a method requiring administration of the pesticide of Group III, non elected.

### ***Claim Rejections - 35 USC § 103***

Claims 1, 3-8, 10, 11, 13, 14, 16, 18-20, 38 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over HARMON 3558787 and KLOPPING --3789122 in view of BEATY -5634959 as explained by evidence of BATH-6083293.

HARMON provides phytotoxic pesticides; fungicides, insecticides, nematocides in combination compositions (column 3 – 6) with nutrients and fertilizers. Pesticides are at 1-30% as dust, 10-50% aqueous (column 4). Included are sodium aluminofluoride (column 5, line 28), compositions are applied to plant (column 6, application).

Surfactants serve as the instant macronutrients and carbon skeleton energy source, ethoxylated alcohols, for example (column 7, lines 59-60, while macronutrients include free acids (column 7, lines 61, 62). Surfactants are at 2-3% (Example 1, 2.).

Micronutrients are seen as the sodium lignosulfonate sodium-complexing agent (Example 1) at 4%. No particular co-factor is readily evident.

KLOPPING also provides pesticidal compositions for plant application (column 1) as copper and zinc complexes with benzamides (column 17, 18) functioning not only as fungicides, but also shows added efficacy against plant mites (col. 20, lines 5-10). Also present are energy sources, oils (column 26, line 11+) as carbon skeleton energy components, with detergents, and (example 29) with water-soluble macronutrients-cane sugar.

BEATY is cited to show fertilizer and nutrients useful to apply to plants; Thus, the generally mentioned fertilizers of HARMON and KLOPPING would include these nutrient ingredients. BEATY includes as fertilizer component the seaweed extract (col. 4, charts). BATH gives us a breakdown of this seaweed, (Col. 6, table). The components of the seaweed include vitamins, biotin; macronutrients, N, P, Ca, Mg, S, Cl, Na, C, H & O; micronutrients, Zn, Fe, Mn, Cu, B, Mo, & Co; and assimilable carbon-skeleton energy components of protein & fat. The seaweed is about 10% of the fertilizer (col. 5, lines 12-18). Thus the vitamin would be at least at 10% of the lowest levels shown above trace, namely .000006, or .000006 %. The carbon-skeleton, fat @ 2.6 %, when 10% seaweed extract is present, would be 0.26 % of the composition, while the macronutrients would constitute, for N, @ 1.46 %, 0.146% of the composition, while the micronutrients if Fe @ 0.08956 % would be at 0.008956 %, all within the claimed instant ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made desiring to utilize pest control means to protect crop plants, to use any of art recognized means, as of the HARMON &/OR KLOPPING, modified as desired to increase the range of pests protected against & the degree of protection, by using a combination of fungicides, with a miticidal added benefit of the KLOPPING fungicides with lower amounts of each fungicide required, & thus providing reduced toxicity to the plants themselves. One would also be motivated to add fertilizer, because both HARMON & KLOPPING so instruct, and BEATY shows what constitutes fertilizer for plant application, further specified as to the breakdown of components shown by BATH.

All references are applicable to the art of plant husbandry & enhanced production.

All the critical elements of the instant are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular species and application method of interest, reduction of toxicity, cost minimization & enhanced plant growth effects.

Applicant has not provided any objective evidence of criticality, nonobvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation AS CLAIMED, and the use of ingredient for the functionality for which they are known to be used is not a basis for patentability.

The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known art recognized methods to achieve improved control as is well known in the art.

The ingredients and amounts are known by the artisan to be used in amounts as are normally used in fertilizer and nutrient amendments. Absence of phytotoxicity would be a function of the concentrations of ingredients, and obvious to attain.

ClaimS 1,3-8, 10, 11, 13, 14, 16, 18-20, 38 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over HARMON 3558787 or KLOPPING --3789122 in view of BATH-6083293.

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BATH gives us the fertilizer & nutrients HARMON & KLOPPING instruct us to add for plant /crop application. The fertilizer includes the components of the instant composition other than the pesticide. These include molasses & yeast extract & a complexing component, from the combining of humus, yeast, molasses & seaweed,(summary). These components enhance crop growth & yield (col. 3, lines 47-63) & would provide through the enhanced plant health & resistance the instant reduction in phytotoxicity , as these are the very components of the instant composition.

The components of the seaweed ( Col. 6, table) include vitamins,biotin; macronutrients, N,P,Ca,Mg,,S,Cl, Na, C,H & O; micronutrients, Zn, Fe, Mn, Cu, B, Mo, & Co; and assimilable carbon-skeleton energy components of protein & fat.

The seaweed is about 10% of the fertilizer (col. 5, lines 12-18), Thus the vitamin would be at least at 10% of the lowest levels shown above trace, namely .000006 , or .0000006 %. The carbon-skeleton,fat @ 2.6 %, when 10% seaweed extract is present, would be 0.26 % of the composition, while the macronutrients would constitute , for N,

@ 1.46 %, 0.146% of the composition, while the micronutrients if Fe @ 0.08956 % would be at 0.008956 %, all within the claimed instant ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made desiring to utilize pest control means to protect crop plants, to use any of art recognized means, as of HARMON &/OR KLOPPING, modified as desired to increase the range of pests protected against & the degree of protection, by using a combination of fungicides, with a miticidal added benefit of the KLOPPING fungicides with lower amounts of each fungicide required, & thus providing reduced toxicity to the plants themselves. One would also be motivated to add fertilizer, because both HARMON & KLOPPING so instruct, and BATH shows what constitutes fertilizer for plant application, further specified as to the breakdown of components.

All the critical elements of the instant are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular species and application method of interest, reduction of toxicity, cost minimization & enhanced plant growth effects.

Applicant has not provided any objective evidence of criticality, nonobvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation AS CLAIMED, and the use of ingredient for the functionality for which they are known to be



used is not basis for patentability.

The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known art recognized methods to achieve improved control as is well known in the art.

The ingredients and amounts are known by the artisan to be used in amounts as are normally used in fertilizer and nutrient amendments. Absence of phytotoxicity would be a function of the concentrations of ingredients, and obvious to attain.

### ***Response to Arguments***

Applicant's arguments, filed 4/20/09, with respect to the rejection(s) of claim(s) 1, 3-8, 10, 11, 13, 14, 16, 18-20, 38 and 39 under 35 USC 112, & 103 have been fully considered and would be persuasive to the extent the claims reflect the argued for effects as supported by the examples. However, ;the claims DO NOT reflect the effects presented, & as argued, are beyond the scope of the specification.

The rejections have been withdrawn in consideration of the arguments for no new matter & for water soluble components. However, upon further consideration, these components are present, & examiner finds BATH explains their presence in the seaweed extract as used by BEATY with ingredients of the HARMON 3558787 / KLOPPING compositions, with BEATY exemplifying the nutrient & fertilizer ingredients meeting the additions of these components, and further explanation of the ingredients of the BEATY reference to the SeaWeed extract as identified by BATH.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/NEIL LEVY/  
Primary Examiner, Art Unit 1615 5/5/09